



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 23-02035
)
Applicant for Security Clearance)

Appearances

For Government: Cynthia Ruckno, Esq., Department Counsel
For Applicant: *Pro Se*

06/28/2024

Decision

BORGSTROM, Eric H., Administrative Judge

Applicant used marijuana on three occasions after having been granted access to classified information and during a period when he regularly used classified information or systems as part of his job responsibilities. He did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 14, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The DCSA CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017.

In Applicant's November 30, 2023 response to the SOR (Answer), he admitted both allegations and provided some additional information about the circumstances surrounding his marijuana use. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On December 27, 2023, the Government was ready to proceed to hearing. I was assigned this case on April 2, 2024. On April 22, 2024, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for May 6, 2024. The hearing proceeded as scheduled. The Government proffered six exhibits, which I admitted as Government Exhibits (GE) 1 through 6 without objection. Applicant testified and did not submit any documentary evidence. At Applicant's request, I held the record open until June 6, 2024, for him to supplement the evidentiary record. DOHA received the hearing transcript (Tr.) on May 16, 2024. On May 29, 2024, Applicant submitted four documents, which I admitted as Applicant Exhibits (AE) A through D without objection. The record closed on May 29, 2024.

Findings of Fact

Applicant is 25 years old. He graduated from high school in June 2017, and he earned a bachelor's degree in April 2021. Since October 2021, he has been employed as a systems administrator for a DOD contractor. He was granted a secret clearance in February 2022. Shortly after he was granted a clearance, he began working on a classified program and his job responsibilities included daily contact with classified materials or information systems. (GE 1, 3-5; Tr. 25, 30-31, 46, 50-52)

On October 13, 2021, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Drug Activity, he reported that he had used marijuana on multiple occasions between December 2014 and September 2021. Specifically, he admitted that he used marijuana approximately 22 times in high school (2015-2017) and approximately 80-90 times during college (2017-2021). He also admitted to using psilocybin mushrooms once in February 2017 and LSD once in February 2019.¹ Lastly, he reported that he had used a prescription drug, Adderall, without a prescription in May 2017. He also responded that he did not intend to use marijuana or any illegal drugs in the future. (GE 2; Tr. 26-27, 48-49)

On February 16, 2023, Applicant updated and submitted an e-QIP, applying for a top secret clearance. Under Section 23 - Illegal Use of Drugs or Drug Activity, he reported verbatim his use of marijuana, mushrooms, and LSD as detailed in his 2021 e-QIP. He also admitted that he had used marijuana on three occasions between July 2022 and December 2022, after having been granted a secret clearance in February 2022 (Section 25). (GE 1)

On April 19, 2023, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management (OPM). He discussed the circumstances of the three instances he used marijuana while possessing a security clearance. In July 2022, he smoked marijuana with a group of friends from high school. In November 2022, he ingested a marijuana edible with two of his siblings. On December 31, 2022, he smoked marijuana provided by a friend. (GE 6)

¹ At the hearing, Applicant corrected his dates of use for mushrooms (February 2018) and LSD (February 2020). (Tr. 48)

During his OPM interview, Applicant provided additional details about his drug involvement during college. In college, he spent approximately \$30 every two months on marijuana between 2018 and 2021. Applicant's brother also grew a marijuana plant between 2017 and 2019. As of the interview, Applicant reported that he still had contact with his siblings, whom he believed would continue to use drugs in the future. (GE 6; Tr. 58-59)

At the hearing, Applicant testified that he was required to pass a pre-employment drug test prior to his hiring by his current employer. He believed that he was subject to random drug testing by his current employer and that he had signed a drug-free workplace policy during his onboarding. He was aware that marijuana use was prohibited by Federal drug laws, but he was unclear about the interplay of Federal drug laws with state laws permitting recreational marijuana use. He was clear that marijuana use was prohibited by DOD clearance holders. (Tr. 29, 53-54)

At the hearing, Applicant confirmed his use of marijuana in July 2022, in November 2022, and on December 31, 2022. His current girlfriend was present when he used marijuana in July 2022 and December 2022, but she did not use marijuana herself. When confronted as to why Applicant used marijuana after stating in his 2021 e-QIP that his work was of primary importance, he responded:

It kind of dropped a little because I was familiar with all my programs, my coworkers, management, you know, a lot of new friends, stuff like that. So things were just feeling good. And when 4th of July came around, I was - I was kind of just said, what the heck. And I thought I was in a safe environment, and you know, it was one or two hits

He repeatedly testified that he had not considered his minimal marijuana use, while possessing a security clearance, to be of security significance, at the time of the conduct. He claimed that when he was required to submit an updated security clearance application in February 2023, he was struck by the gravity of safeguarding classified information. In the past, Applicant's siblings have repeatedly offered him marijuana; however, he has informed his family members that he will abstain from marijuana use. (Tr. 32-33, 37, 39-40, 42, 44, 56)

In a post-hearing statement, Applicant attributed his past marijuana use to immaturity and a lack of professionalism. He emphasized his candor by disclosing his marijuana use on his 2023 e-QIP and his intent to abstain from illegal drugs in the future. On May 9, 2024, he participated in and passed a five-panel drug screening. (AE A, AE B)

Whole Person

Applicant submitted performance reviews for 2022 and 2023. His manager considers him to be a "trusted team member" who "continually makes valuable contributions to the program." In 2023, Applicant's subject-matter expertise grew, and he took on additional responsibilities. His manager praised his strong character traits - instilling trust, reliability, motivation, and leadership. (AE C, AE D)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1 (b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. In this case, the following disqualifying conditions potentially apply:

(a) any substance misuse; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

On December 21, 2021, the DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Between December 2014 and December 31, 2022, Applicant used marijuana on over 100 occasions. After having been granted a secret clearance in February 2022, and with daily access to classified materials and systems, Applicant used marijuana in July 2022, in November 2022, and on December 31, 2022.

The Security Executive Agent Directive (SEAD) 4 ¶ D.8. defines a "sensitive position" as:

Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant had access to classified information, and regardless of whether the occupant is an employee, military service member, or contractor.

See ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). As defined by the SEAD 4, Applicant's marijuana use occurred while he had regular access to classified information and while holding a "sensitive position." AG ¶¶ 25(a) and 25(f) apply.

Conditions that could mitigate the drug involvement security concerns are provided under AG ¶ 26. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant knowingly and repeatedly violated Federal drug laws, his employer's drug-free workplace policy, and DOD policies for clearance holders when he used marijuana in July 2022, November 2022, and late December 2022. He has had regular access to classified information since February 2022, and he had avowed his intent to abstain from illegal drugs in his October 2021 e-QIP. Notwithstanding Applicant's candor and honesty in his e-QIP disclosures, during his OPM interview, and at the hearing, doubts persist as to his judgment and reliability. Furthermore, although less frequent, he still associates with individuals with whom he had used marijuana previously. Given the length and frequency of Applicant's drug involvement (over eight years), he has not established a pattern of abstinence, particularly in light of his recent use while employed by a DOD contractor and with daily access to classified information. Applicant did not mitigate the drug involvement security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust by considering the totality of the applicant's

conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant has thrived professionally, as illustrated by his two performance reviews. Nonetheless, he has not demonstrated that he grasps the gravity of adhering to rules and regulations by those entrusted to safeguard classified information. He considered his infrequent use of marijuana while holding a security clearance to be insignificant until he applied for a top secret clearance in February 2023. Notwithstanding his candor and sincerity, Applicant's recent and repeated use of marijuana while possessing a security clearance continues to raise doubts about his judgment and reliability. In the future, with the passage of time and continued abstinence and good judgment, he may be able to mitigate the drug involvement security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a.-1.b.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge